91-823

(1)

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

HENRY HOLLEY,
Petitioner

Versus

RONALD SCHREIBECK AND
CITY OF ALLENTOWN,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT AN AMENDED COMPLAINT WHICH ALLEGES THAT A WHITE POLICE OFFICER TOLD WHITE FEMALES TO STAY AWAY FROM PLAINTIFF, A BLACK MALE, BECAUSE HE WAS A PIMP OUT OF RACIAL ANIMOSITY TOWARDS THE PLAINTIFF STATES A CLAIM UNDER THE FEDERAL CIVIL RIGHTS ACT IN THAT THE CONDUCT OF THE OFFICER VIOLATES THE PLAINTIFF'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT?

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TABLE OF CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

NO.

HENRY HOLLEY,
Petitioner

v.

RONALD SCHREIBECK AND
CITY OF ALLENTOWN
Respondent

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Henry Holley, prays that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit rendered August 21, 1991 is unrecorded and appears at Appendix A Page 20.

The Order of the United States District Court for the Eastern District of Pennsylvania rendered March 1, 1991 is unrecorded and appears at Appendix B Page 24.

The final Order of the United States Court of Appeals for the Third Circuit is dated August 21, 1991 and this Petition for Writ of Certiorari is timely filed, written ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. §1254 (1) and Rule 17 of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

42 U.S.C. §1983 at Appendix C Page 43. Fourteenth Amendment of United States Constitution at Appendix D Page 44.

STATEMENT OF CASE

This is an appeal from dismissal of Petitioner/Appellant's Amended Complaint for failure to state a Federal cause of actions.

Appellant's Federal claims are set forth in Counts One and Two of Appellant's Amended Complaint which follows:

"6. Plaintiff is a black adult male.

7. Prior to December 30, 1989, Defendant occasionally visited some friends who happened to be white females who work at commercial establishments of the City of Allentown.

8. On or about December 30, 1989, Defendant, Ronald Schreibeck, while on duty as a police officer for the City of Allentown, approached a number of Plaintiff's white female friends while at work in commercial establishments in the City of Allentown, and maliciously reported to these friends to stay away from Plaintiff because Plaintiff was a 'pimp' and/or 'involved with prostitution activities.'

9. At the time and place aforesaid, Defendant Schreibeck solely because of his race, intentionally and purposefully schemed to inhibit and block these white females from engaging in or associating with black Plaintiff, and told them that 'Defendant and people would believe that they were prostitutes if they had any communication or association with Plaintiff.'

10. Plaintiff has never engaged in or been convicted of any offense relating to prostitution or pimping.

11. Defendant, Ronald Schreibeck's conduct as aforesaid, while on duty as a police officer and in the course of his employment whereby acting under lawful police authority from the City of Allentown, violated Plaintiff's constitutional right to free association and to equal protection of the laws solely out of animus based upon Plaintiff's race.

12. As a direct and proximate result of Defendant, Ronald Schreibeck's conduct, as aforesaid, Plaintiff's white female friends are so intimidated by Defendant's outrageous conduct that they are afraid to associate with Plaintiff or have ceased all communication and association with Plaintiff.

13. As a direct and proximate result of Defendant Schreibeck's outrageous

conduct, Defendant has succeeded in implementing his invidiously discriminatory enforcement of the laws by acting under color of law to use intimidation and other unlawful tactics to alienate, prohibit and
inhibit Plaintiff, a black male, from lawful behavior visiting white female friends at commercial establishments while allowing similarly situated white males to visit white females at commercial establishments.

14. As a direct and proximate result of Defendants invidiously discriminatory conduct, Plaintiff suffered loss of friends, companionship and sever mental pain, emotional anguish, distress, humiliation and sleeplessness entitling Plaintiff to damages in excess of Fifty Thousand ($50,000.00) Dollars.

15. Defendant's aforesaid conduct was outrageous, egregious, intentional, willful and wanton, entitling Plaintiff to punitive damages in excess of Fifty Thousand ($50,000.00) Dollars.

WHEREFORE, Plaintiff demands judgment
against Defendant, Ronald Schreibeck, in an amount in excess of Fifty Thousand ($50,000.00) Dollars, together with costs of suit and reasonable attorney fees.

COUNT TWO

16. At all times herein relevant, Defendant City of Allentown, employed Police Officer Ronald Schreibeck, who acted pursuant to government policy implemented, approved, encouraged and/or acquiesced in by Defendant, City of Allentown, relative to the treatment and enforcement of laws against black persons.

17. At all times herein relevant, Defendant, City of Allentown, had actual or constructive knowledge that Policy Officer Ronald Schreibeck had racist propensities towards black persons and that Police Officer Ronald Schreibeck's racist propensities manifested themselves and affected his performance while on duty for and in the course of his employment with Defendant, City of Allentown.

18. At all times herein relevant, despite actual or constructive knowledge of Police Officer Ronald Schreibeck's and other Defendant Police Officer's racist propensities toward black persons, Defendant, City of Allentown, failed to discipline and/or reprimand the officers and affirmatively covered up the officers conduct resulting from their racist propensities, thus permitting, aiding, approving and/or acquiescing in Police Officer Ronald Schreibeck's conduct

resulting from his racist propensities toward black persons, constituting inter alia a deliberate indifference to the constitutional rights of Plaintiff and others.

19. As a natural, and direct or proximate result of Defendant, Ronald Schreibeck's statement, as aforesaid, Plaintiff suffered severe mental pain and emotional anguish, distress, humiliation, and damages to his reputation in excess of Fifty Thousand ($50,000.00) Dollars.

20. As a direct and proximate result of Defendant City's racist customs, policies and/or deliberately indifferent actions and Defendant, Schreibeck's aforesaid conduct in accordance therewith, Plaintiff suffered injuries, damages and constitutional deprivations set forth hereinbefore for which Plaintiff seeks compensation.

WHEREFORE, Plaintiff demands judgment against Defendant, City of Allentown, in an amount in excess of Fifty Thousand ($50,000.00) Dollars, together with costs of suit."

The District Court, without considering Petitioner's equal protection claim, dismissed Petitioner's

Amended complaint for failure to state a cause of action.

The District Court entered a one-sentence order dismissing Petitioner's Amended Complaint. Petitioner reasonably sought reconsideration. Upon reconsideration, the District Court imposed unspecified sanctions against Petitioner's counsel directing Petitioner's Counsel to pay Respondent's attorney fees in responding to Petitioner's Motion To Reconsider.

Petitioner respectfully appeals the dismissal of Petitioner's Amended Complaint and the imposition of sanctions against Petitioner's counsel. Petitioner respectfully submits this Brief in support of his appeal.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 17 (1) (a) of the Rules of the United States Supreme Court in that a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter as to call for an exercise of this Honorable Court's power of supervision.

ARGUMENT

I. WHETHER OR NOT AN AMENDED COMPLAINT ALLEGES THAT A WHITE POLICE OFFICER TOLD WHITE FEMALES TO STAY AWAY FROM PLAINTIFF, A BLACK MALE, BECAUSE HE WAS A PIMP OUT OF RACIAL ANIMOSITY TOWARDS THE PLAINTIFF STATES A CLAIM UNDER THE FEDERAL CIVIL RIGHTS ACT IN THAT THE CONDUCT OF THE OFFICER VIOLATES THE PLAINTIFF'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT?

1. To state a claim under 42 U.S.C. §1983, Appellant must allege that Appellee, acting under color of law, deprived Appellant of a constitutional right. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

2. Petitioner specifically alleged that Respondent, Schreibeck, as an on-duty police officer, intentionally discriminated against black Petitioner in the enforcement of laws solely out of animus based upon race.

Petitioner alleged the following:

"6. Plaintiff is a black adult male.

7. Prior to December 30, 1989, Defendant occasionally visited some friends who happened to be white females who work at commercial establishments of the City of Allentown.

8. On or about December 30, 1989, Defendant, Ronald Schreibeck, while on duty as a police officer for the City of Allentown, approached a number of Plaintiff's white female friends while at work in commercial establishments in the City of Allentown, and maliciously reported to these friends to stay away from Plaintiff because Plaintiff was a 'pimp' and/or 'involved with prostitution activities.'

9. At the time and place aforesaid, Defendant Schreibeck solely because of his race, intentionally and purposefully schemed to inhibit and block these white females from

engaging in or associating with black Plaintiff, and told them that 'Defendant and people would believe that they were prostitutes if they had any communication or association with Plaintiff.'

10. Plaintiff has never engaged in or been convicted of any offense relating to prostitution or pimping.

11. Defendant, Ronald Schreibeck's conduct as aforesaid, while on duty as a police officer and in the course of his employment whereby acting under lawful police authority from the City of Allentown, violated Plaintiff's constitutional right to free association and to equal protection of the laws solely out of animus based upon Plaintiff's race.

12. As a direct and proximate result of Defendant, Ronald Schreibeck's conduct, as aforesaid, Plaintiff's white female friends are so intimidated by Defendant's outrageous conduct that they are afraid to associate with Plaintiff or have ceased all communication and association with Plaintiff.

13. As a direct and proximate result of Defendant Schreibeck's outrageous conduct, Defendant has succeeded in implementing his invidiously discriminatory enforcement of the laws by acting under color of law to use intimidation and other

> unlawful tactics to alienate, prohibit and inhibit Plaintiff, a black male, from lawful behavior visiting white female friends at commercial establishments while allowing similarly situated white males to visit white females at commercial establishments."
>
> [Paragraphs 6 through 13 inclusive]

3. The Fourteenth Amendment of the United States Constitution prohibits the states from denying any person the equal protection of the laws. U. S. Constitution, Fourteenth Amendment. An on-duty police officer must enforce laws equally regardless of a person's race. U. S. Constitution, Fourteenth Amendment.

Petitioner alleged that, inter alia, "Defendant has succeeded in implementing his invidiously discriminatory enforcement of the laws by acting under color of law to use intimidation and other unlawful tactics

to alienate, prohibit and inhibit Plaintiff, a black male, from lawful behavior of visiting white female friends at commercial establishments which allowing similarly situated white males to visit while female at commercial establishments." (App. p. 40a). Petitioner alleged that Respondent failed to enforce laws equally based upon Appellant's race. Id. Bethel v. Pendoco Constro. Corp. 70 F.2d 168 (3d Cir 1978); Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262 (3d Cir, 1989).

4. Petitioner stated a valid claim under 42 U.S.C. §1983 based upon Respondent's alleged discriminatory enforcement of laws, as aforesaid. The District Court did not discuss, but summarily dismissed, Appellant's §1983

equal protection claim. If Appellant's allegations fail to state an equal protection claim, then the Civil Rights Act of 1964 has no use or meaning. A white police officer lawfully may not enforce laws unequally depending upon a person's race. Id. 42 U.S.C. §1983, U. S. Constitution, Fourteenth Amendment; Glover v. City of New York, 401 F.Supp 632 (D.C. NY 1975) (where misconduct on part of public police officer, to extent that it infringes upon constitutionally protected rights, gives rise to civil rights action for deprivation of rights under color of state law). Hence, the order dismissing Petitioner's §1983 equal protection claim must be reversed. Gomez v. Toledo, 446 U. S. 635, 640 (1980).

5. Petitioner stated a valid §1983 claim against Defendant, City in Count

Two of Appellant's Amended Complaint. To state a §1983 claim against a municipality, Petitioner must allege that a custom, policy, statement, ordinance, regulation, or decision officially adopted by Respondent municipality, proximately caused a deprivation of Petitioner's constitutional right. Monell v. Department of Social Services, 436 U. S. 658 (1978).

In Count Two, Petitioner alleged:

COUNT TWO

16. At all times herein relevant, Defendant City of Allentown, employed Police Officer Ronald Schreibeck, who acted pursuant to government policy implemented, approved, encouraged and/or acquiesced in by Defendant, City of Allentown, relative to the treatment and enforcement of laws against black persons.

17. At all times herein relevant, Defendant, City of Allentown, had actual or constructive knowledge that Policy Officer Ronald Schreibeck had racist propensities towards black persons and that

Police Officer Ronald Schreibeck's racist propensities manifested themselves and affected his performance wile on duty for and in the course of his employment with Defendant, City of Allentown.

18. At all times herein relevant, despite actual or constructive knowledge of Policy Officer Ronald Schreibeck's and other Defendant Policy Officer's racist propensities toward black persons, defendant, City of Allentown, failed to discipline and/or reprimand the officers and affirmatively covered up the officers conduct resulting from their racist propensities, thus permitting, aiding, approving and/or acquiescing in Police Officer Ronald Schreibeck's conduct resulting from his racist propensities toward black persons, constituting inter alia a deliberate indifference to the constitutional rights of Plaintiff and others.

19. As a natural, and direct or proximate result of Defendant, Ronald Schreibeck's statement, as aforesaid, Plaintiff suffered severe mental pain and emotional anguish, distress, humiliation, and damages to his reputation in excess of Fifty Thousand ($50,000.00) Dollars.

20. As a direct and proximate result of Defendant City's racist customs,

> policies and/or deliberately indifferent actions and Defendant, Schreibeck's aforesaid conduct in accordance therewith, Plaintiff suffered injuries, damages and constitutional deprivations set forth hereinbefore for which Plaintiff seeks compensation.
>
> [Plaintiff's Amended Complaint, Paragraphs 16 - 20]

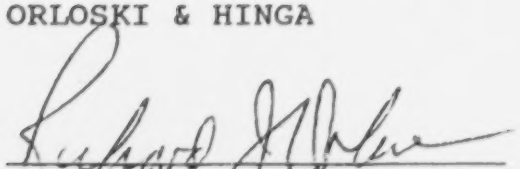
Petitioner clearly alleged the requisite elements of §1983 action against Respondent, City set forth in Monell and its progeny. The Order dismissing Count Two of Respondent's Amended Complaint ought to be reversed. Petitioner thus seeks review by this Honorable Court.

Petitioner clearly alleged Respondent police officer violated Appellant's right to equal protection of law as set forth above. Possibly, this case must be analyzed in terms of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari ought to be granted.

ORLOSKI & HINGA



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APPENDIX A - 3rd Circ Order and Opinion - Cowen, Nygaard and Weis

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 91-1221

HENRY HOLLEY,
Appellant

v.

RONALD SCHREIBECK and
CITY OF ALLENTOWN

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D. C. Civil No. 90-08012)
District Judge: Hon. Franklin S. Van Antwerpen

Submitted Under Third Circuit Rule 12(6)
August 15, 1991

Before: COWEN NYGAARD AND WEIS,
Circuit Judges

JUDGMENT ORDER

After considering the contention

raised by appellant, it is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxes against appellant.

ATTEST: By the Court,

_____ _____
Sally Mrvos, Clerk CIRCUIT JUDGE

Dated:_____

APPENDIX B - Order and Opinion - U.S. District Court - Hon. Franklin Van Antwerpen

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HENRY HOLLEY	:	
Plaintiff	:	CIVIL ACTION
	:	
vs.	:	No. 90-8012
	:	
RONALD SCHREIBECK,	:	JURY TRIAL
and CITY OF	:	DEMANDED
ALLENTOWN	:	

ORDER

AND NOW, this 25th day of January, 1991, upon consideration of Defendant's motion to dismiss, IT IS ORDERED that Defendants' motion to dismiss is hereby GRANTED and that Plaintiff's Amended Complaint is

dismissed without leave to amend.[1]

BY THE COURT:

_____

Franklin S. Van Antwerpen, J.

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[1]No timely response has been filed and the Court deems this motion to be unopposed and uncontested under Local R. Civ. P.20 (c). Brief has been filed as expressly required. In addition the amended Complaint does no make out a Federal cause of Action.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HENRY HOLLEY Plaintiff	:	CIVIL ACTION
vs.	:	No. 90-8012
RONALD SCHREIBECK, and CITY OF ALLENTOWN	:	JURY TRIAL DEMANDED

OPINION AND ORDER

VAN ANTWERPEN, J. MARCH 1, 1991

This civil rights matter comes before the court on the motion of Henry Holley, the plaintiff, for reconsideration of the court's Order of January 25, 1991 which granted the defendants' motion, under Fed. R. Civ. P. 12(b) (6), and dismissed plaintiff's amended complaint without leave to amend. In so doing, the court expressly noted that no brief had been filed by plaintiff in response to defendants' motion as required by Eastern District of Pennsylvania Local

Rule of Civil Procedure 20(c). In addition, the court noted that plaintiff's amended complaint did not make out a federal cause of action.

The procedural history of this case may be outlined as follows. The plaintiff filed a complaint alleging federal civil rights violations under 42 U.S.C. §1981 on December 20, 1990. Thereafter, on January 8, 1991, defendants filed a motion, under Fed. R. Civ. P. 12(b) (6), to dismiss plaintiff's complaint. On January 18, 1991, plaintiff filed an amended complaint, which eliminated the claim under 42 U.S.C. §1981, but stated a claim under 42 U.S.C. §1983, alleging the same basic facts alleged in the original complaint with certain minor changes. Nothing other than an amended complaint was filed. The court granted the defendants' motion to dismiss

without leave to amend on January 25, 1991. Plaintiff filed a motion for reconsideration and brief on February 6, 1991 which is presently before the court. Since there were two grounds for the dismissal, we shall treat the procedural ground first.

In his motion for reconsideration, plaintiff correctly notes that he was entitled to file an amended complaint as a matter of course under Fed. R. Civ. P. 15(a). See, e.g., Kelley v. Delaware River Joint Commission, 187 F.2d 93 (3d Cir. 1951). Plaintiff also correctly notes in his motion for reconsideration that plaintiff's amended complaint superseded the original complaint which, thereafter, is treated as non-existent. Bullen v. De Bretteville, 239 F.2d 824 (9th Cir. 1956), cert. denied, 353 U.S. 947 (1957). The problem with

plaintiff's actions is that, as expressly noted in the court's prior order, no brief was ever filed together with the amended complaint. Local Rule 20(c) provides, as follows:

> "Every motion not certified as uncontested shall be accompanied by a brief. A brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion. Unless the parties have agreed upon a different schedule and such agreement is set forth in the motion or unless the court directs otherwise any party opposing the motion shall serve a brief in opposition together with such answer or other response as may be appropriate within 10 days after service of the motion and supporting brief . . .
>
> [Id. (emphasis added)]

We do not dispute that the amended complaint qualified under this local rule as a "response." Our difficulty was and is with the unexplained failure of plaintiff's counsel to file a brief along with the response. A brief would

have been particularly helpful in responding to defendants' arguments because, although plaintiff chose to change the legal characterization of the action in an amended complaint, the underlying facts remained basically the same.

This is not the first case in which this court has had this kind of difficulty with this particular plaintiff's counsel. Plaintiff's counsel is obliged to abide by the court's Local Rules of Civil Procedure, not by the rules as he envisions them. Since counsel did file an amended complaint as a response under Local Rule 20(c), we will not treat the prior motion to dismiss as unopposed or uncontested. We will, however, impose appropriate sanctions on plaintiff's counsel for the failure to file a brief

and direct that plaintiff's counsel pay defendants' counsel fees in responding to this motion to reconsider.

This brings us to the second ground for our previous dismissal, which was the perceived failure of even the amended complaint to make out a federal cause of action. Fed. R. Civ. P. 12(b)(6) allows a court to dismiss "for failure to state a claim upon which relief can be granted." The criteria which a court must use in deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6) are clear:

> "In reviewing a motion to dismiss a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party. Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985); Rogin v. Bensalem Township, 616 F. 2d 680, 685 (3d Cir. 1980), cert.

denied, 450 U.S. 1029 (1981). Sturm v. Clark, 835 F2d 1009, 1011 (3d Cir. 1987).

The Third Circuit has also stated:

> "In deciding a Rule 12(b) (6) motion,factual allegations of the complaint are to be accepted as true and the complaint should be dismissed only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Reasonable factual inferences will be drawn to aid the pleader. Amalgamated Transit Union v. Byrne, 568 F.2d 1025, 1031 (3d Cir. 1977) (in banc) (Aldisert, J., dissenting); Knuth v. Erie-Crawford Dairy Cooperative Ass'n, 395 F.2d 420 (3d Cir. 1968).

D.P. Enterprises, Inc. v. Bucks County Community College, 7215 F.2d 943, 944 (3d Cir. 1984).

We do not grant a motion to dismiss under Fed. R. Civ. P. 12(b) (6) lightly because a dismissal denies the parties a full trial on the merits. At the same time, we do not see how the simple fact situation alleged could become more favorable for plaintiff with in-depth discovery, another amended complaint or

live testimony in court. In short, taking the basic factual allegations as true, the facts are as good for plaintiff as they are going to get, and we shall review these facts under the foregoing legal standards.

Taken at their best, the allegations of plaintiff's amended complaint are that the defendant "occasionally visited some friend (sic) who happened to be white females," (Complaint, paragraph 7); and that on one occasion, namely on or about December 30, 1989, the defendant Robert Schreibeck, while on duty as a police officer for the City of Allentown and while acting as a policeman, approached a number of plaintiff's "white female friends" while they were working in commercial establishments in the City of Allentown, and advised these individuals

to "stay away from plaintiff because plaintiff was a pimp and/or involved with prostitution activities." (Complaint, paragraph 8). Plaintiff further alleges that defendant did this solely because of the race of the plaintiff and to prevent these females from "engaging in or associating with black plaintiff." (Complaint, paragraph 9). There are no allegations that anyone was taken into custody or even directly threatened with arrest. Plaintiff claims that he is damaged because "as a direct and proximate result of the defendant Robert Schreibeck's conduct," plaintiff is "alienated, prohibited and inhibited from visiting white female friends at commercial establishments and that they are afraid to association (sic) with plaintiff." (Complaint, paragraphs 11,

12). Plaintiff's claims against the City of Allentown are based upon an alleged failure to discipline and reprimand the officer, as well as a cover-up of his allegedly know racist propensities. (Complaint, paragraph 18, 19).

We do not believe that the facts alleged rise to a violation under 42 U.S.C. §1983, nor do we believe there is a violation of plaintiff's right to equal protection of law.

In Roberts v. United States Jaycees, 468 U.S. 609, 82 L.Ed.2d 462, 104 S.Ct. 3244 (1984), the United States Supreme Court upheld a Minnesota state statute requiring local Jaycee chapters to admit women. The court noted only two different sorts of "freedom of association" that are protected by the United States Constitution. One is

based upon the First Amendment and includes freedom of speech, as well as the right of assembly and petition for redress. The other is based upon "certain intimate human relationship which must be secured against undue intrusion by the state because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." Roberts, 468 U.S. at 618.

In Dallas v. Stanglin, 490 U.S. 19, 109 S. Ct. 1591, 104 L.Ed.2d 18 (1989), the Supreme Court upheld a city ordinance which restricted admission to certain dance halls to patrons between the ages of fourteen and eighteen. The court held that the city ordinance did not violate the patrons' First Amendment rights of free association or equal protection of laws under the United

States Constitution. In so holding, the court further explained Roberts and stated:

The cases cited in Roberts recognized that:

> "...freedom of speech" means more than simply the right to talk and to write. It is possible to find some kernel of expression in almost every activity a person undertakes - for example, walking down the street or meeting one's friends at a shopping mall - but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons - coming together to engage in recreational dancing - is not protected by the First Amendment. Thus this activity qualifies neither as a form of "intimate association" nor as a form of "expressive association" as those terms were described in Roberts. Unlike the Court of Appeals, we do not think the Constitution recognizes a generalized right of social association that includes chance encounters in dance halls."
>
> [Stanglin, 490 U.S. at 25 (emphasis added)]

In Plaintiff's amended complaint, it is

alleged that Ronald Schreibeck's comments have prohibited and inhibited plaintiff from visiting white female friends at commercial establishments. This is precisely the type of conduct which the Supreme Court in Stanglin held was outside the scope of First Amendment protection. For this reason, we concluded in our prior order that plaintiff's amended complaint failed to make out a viable cause of action for violation of the right of free association.

We note other authority which supports our position. In Swank v. Smart, 898 F.2d 1247 (7th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 147 (1990), the court was faced with the discharge of a police officer which was based in part upon an off-duty motorcycle ride with a seventeen year-

old female college student. The court stated that this type of encounter did not implicate First Amendment rights of intimate association:

> "The purpose of the free-speech clause and of its judge-made corollary the right of association is to protect the market in ideas, Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting), broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions--scientific, political, or aesthetic--to an audience whom the speaker seeks to inform, edify, or entertain. Casual chit-chat between two person or otherwise confined to a small social group in unrelated, or largely so, to that marketplace, and is not protected. Such conversation is important to its participants but not to the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values, and consequences of the speech that is protected by the First Amendment."
>
> [898 F.2d at 1250]

In IDK, Inc. v. County of Clark, 836 F.2d 1185 (9th Cir. 1988), the court

upheld a county regulation concerning licensing and control of escort services and their employees. The court found the regulation constitutional on its face and states that escort service associations were not the type of intimate "family and similar highly personal relationships" protected by the Constitution. Id. at 1193. The court went on to note that escort service associations were not protected, as a part of free speech, under the First Amendment.

Mere words standing alone will not support a civil rights action. As our former chief judge noted in Johnson v. Hackett, 284 F.Supp. 933, 940 (E.D. Pa. 1968):

> "The private right to enjoy integrity of reputation (the law of libel and slander) and the public right to tranquility (laws dealing with breach of the peace) are

> matters of state concern. Beauharnais v. People of State of Illinois, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952). Defining and punishing the use in public place of words likely to cause a breach of the peace is a matter "within the domain of state power." Chaplinsky v. State of New Hampshire, 315 U.S. 568, 573, 62 S.Ct. 766, 770, 86 L.Ed. 1031 (1942). Common law slander by a public official is not within the ambit of civil rights protected under the Constitution. Hopkins v. Wasson, 227 F.Supp. 278 (E.D. Tenn.S.D. 1962)."

Plaintiff's action is nothing more than a defamation suit in disguise and it belongs in the state courts.[1] As a matter of common sense, we do not believe that the alleged result of a single remark such as that allegedly made by the officer in this case rises to a level which requires constitutional protection. Were we to so hold,

---

[1]We express no opinion whether or not such a suit in the state court would be barred by a privilege or governmental immunity. See 42 Pa. C.S.A. §8541.

virtually ever public arrest in which the policy accuse someone of committing a crime would give rise to a federal civil rights action.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HENRY HOLLEY Plaintiff	:	CIVIL ACTION
vs.	:	No. 90-8012
RONALD SCHREIBECK, and CITY OF ALLENTOWN	:	JURY TRIAL DEMANDED

ORDER

AND NOW, this first day of March, 1991, plaintiff's Motion for Reconsideration filed February 6, 1991 is hereby DENIED. Accordingly, the court's prior Order of January 25, 1991 dismissing plaintiff's amended complaint with prejudice stands. Defense counsel shall file, within eleven (11) days of the date of this Order, An Affidavit setting forth counsel fees and costs expended in the argument of plaintiff's motion for reconsideration. If no exceptions to said Affidavit are filed within eleven (11) days of the filing of the

Affidavit, plaintiff's counsel shall pay said counsel fees and costs within twenty (20) days of filing of said Affidavit.

BY THE COURT

_____

Franklin S. Van Antwerpen, J.

APPENDIX C - 42 U.S.C. 1983

Civil action for deprivation of rights

Every person who, under color of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX D - U.S. Constitution - Fourteenth Amendment

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

(2)

NO. 91-823

IN THE

SUPREME COURT OF THE UNITED STATES
October, 1991 Term

HENRY HOLLEY,

Petitioner

versus

RONALD SCHREIBECK and
CITY OF ALLENTOWN,

Respondents

PETITION FOR WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, WHERE PETITIONER ALLEGED NOTHING MORE THAN ON A SINGLE OCCASION A POLICE OFFICER TOLD SEVERAL WHITE FEMALES TO STAY AWAY FROM PETITIONER, A BLACK MALE, BECAUSE HE WAS A PIMP.

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COUNTERSTATEMENT OF THE CASE

Petitioner, Henry Holley, filed a complaint in the United States District Court for the Eastern District of Pennsylvania on or about December 20, 1990. The complaint alleged that Respondents, Ronald Schreibeck and the City of Allentown, violated Petitioner's rights to free association under the First Amendment to the United States Constitution. In addition, the complaint alleged pendent state law claims for defamation. The district court's jurisdiction was alleged to have derived from 42 U.S.C. §§1981 and 1983.

On or about January 8, 1991, Respondents filed a motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) based upon the failure of the

complaint to state a claim upon which relief could be granted.

On January 18, 1991, in lieu of filing a brief and in response to Respondents' Rule 12(b)(6) motion, Petitioner filed an amended complaint. The amended complaint eliminated Petitioner's claim under 42 U.S.C. §1981 and added an allegation that his constitutional right to equal protection of the laws had been violated. Although Rule 20(c) of the Local Rules of the United States District Court for the Eastern District of Pennsylvania expressly required Petitioners to file and serve a brief in opposition to Respondents' Rule 12(b)(6) motion, Petitioner failed to do so.

The district court, on January 25, 1991, entered an order granting

Respondents' motion to dismiss and dismissing Petitioner's amended complaint without leave to amend, holding that the amended complaint failed to state a federal cause of action. The district court noted Petitioner's failure to file a brief in violation of Local Rule 20(c) and deemed the motion to dismiss as being uncontested. A copy of the district court's order is attached hereto as Appendix A.

In response to the district court's January 25, 1991 order dismissing the amended complaint, Petitioner filed a motion for reconsideration. On March 4, 1991, the district court entered an opinion and order which denied Petitioner's motion for reconsideration and assessed counsel fees and costs expended by Respondents in responding to

the motion for reconsideration.

Thereafter, the Petitioner filed an appeal with the United States Court of Appeals for the Third Circuit from the district court's orders dismissing the amended complaint and assessing counsel fees and costs. The Third Circuit, in a one-sentence judgment order, affirmed the district court's judgments.

In both his complaint and amended complaint, Petitioner alleged that on December 30, 1989, Respondent, Ronald Schreibeck, while on duty as a police officer for Respondent, City of Allentown, approached several of Petitioner's white, female friends and reported to them to stay away from Petitioner because Petitioner was a pimp and/or involved with prostitution activities. Petitioner, a black male, further alleged that he has

never been convicted of any offense relating to prostitution or pimping and denied that he was ever a pimp or involved in any prostitution activities. The amended complaint alleged that Officer Schreibeck's remark to Petitioner's white female friends was prompted by a desire to enforce the laws in a manner which discriminated against blacks. Moreover, Petitioner alleged that the City of Allentown knew of Officer Schreibeck's "racist propensities" and acquiesced in his conduct. The amended complaint is devoid of any allegations that any investigations of Petitioner or his friends were conducted, that any arrests were made, or that any other actions were taken against them. Rather, Petitioner's entire cause of action is based upon a

single, allegedly defamatory remark made by the defendant police officer.

Petitioner filed the present petition for a writ of certiorari based upon the equal protection clause of the Fourteenth Amendment to the United States Constitution alleging that a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter.

Respondents submit this brief in opposition to the petition for a writ of certiorari pursuant to Rule 15 of the Rules of this Honorable Court.

SUMMARY OF ARGUMENT

In his petition for writ of certiorari, Petitioner contends that the Third Circuit Court of Appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter so "as to call for an exercise of this Honorable Court's power of supervision" under Rule 17(1)(a) (sic) of the Rules of this Honorable Court. While it is true that Rule 10.1(a) describes such a conflict as a reason for this Honorable Court's exercise of discretionary review, the federal circuit court decisions relied upon by Petitioner have no application to Petitioner's case. Accordingly, no such conflict between the federal courts of appeals exists.

Notwithstanding the bald assertions of his amended complaint, Petitioner failed to make any objective factual allegations from which Respondent Ronald Schreibeck's "racial animus" can be inferred. At best, Petitioner's amended complaint alleges nothing more than a cause of action for defamation under state law, which is not within the ambit of civil rights protected by the United States Constitution.

The Fourteenth Amendment prohibits the denial of equal protection of the laws, but Petitioner's equal protection rights were not implicated in this case because Officer Schreibeck's alleged remark, standing alone, did not constitute law enforcement. No investigations or arrests of Petitioner or his friends were made, and, consequently, Petitioner's

amended complaint failed to allege that Officer Schreibeck was enforcing any law when the alleged remark was made.

ARGUMENT

I. NO CONFLICT EXISTS BETWEEN THE DECISION OF THE THIRD CIRCUIT IN THIS CASE AND A DECISION OF ANY OTHER FEDERAL COURT OF APPEALS SO AS TO JUSTIFY THE EXERCISE OF DISCRETIONARY REVIEW UNDER RULE 10.1(a) OF THE RULES OF THIS HONORABLE COURT.

In his petition for a writ of certiorari, Petitioner states the following as his reason for allowance of the writ:

> Review by certiorari is appropriate in the case at bar under Rule 17(1)(a) (sic) of the Rules of the United States Supreme Court in that a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter as to call for an exercise of this Honorable Court's power of supervision.

A review of the Third Circuit's decision in the case at bar demonstrates that it is not in conflict with the federal appellate decisions cited in the Petition. Indeed, the decision is well-supported by judicial precedent.

The first step in determining whether a conflict exists is to analyze what the Third Circuit decided in this case. Petitioner filed an appeal from the March 1, 1991 order of the United States District Court for the Eastern District of Pennsylvania, which denied Petitioner's motion for reconsideration of the dismissal of Petitioner's amended complaint under Fed.R.Civ.P. 12(b)(6). The district court's March 1, 1991 order also assessed counsel fees and costs expended by Respondents in responding to Petitioner's motion for reconsideration.

In its opinion, the district court initially discussed Petitioner's failure to file a brief in opposition to Respondents' Rule 12(b)(6) motion, as was required by the district court's Local Rule 20(c). Petitioner's only response to the motion to dismiss was an amended complaint. As the district court noted in its opinion:

> We do not dispute that the amended complaint qualified under this local rule as a "response". Our difficulty was and it is with the unexplained failure of Plaintiff's counsel to file a brief along with the response. A brief would have been particularly helpful in responding to defendants' arguments, because, although plaintiff chose to change the legal characterization of the action in an amended complaint, the underlying facts remained basically the same.
>
> This is not the first case in which this court has had this kind of difficulty with this particular plaintiff's counsel. Plaintiff's counsel is obliged

> to abide by the court's Local Rules of Civil Procedure, not by the rules as he envisions them.

The district court then directed Petitioner's counsel to pay Respondents' counsel fees and costs expended in replying to Petitioner's motion for reconsideration. Although in his Statement of Case Petitioner states that he appeals (sic) the dismissal of his amended complaint and the imposition of sanctions against Petitioner's counsel, Petitioner offers no legal authority that would conflict with the district court's decision in this regard.

On appeal, the question is whether the district court abused its discretion in assessing counsel fees and costs against Petitioner's counsel. Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986); Larouche v. National

Broadcasting Co., 780 F.2d 1134 (4th Cir. 1986). Without opinion, the Third Circuit affirmed the district court's order. Considering Petitioner's failure to cite any legal precedent which conflicts with the Third Circuit's decision to affirm the assessment of sanctions, certiorari should not be granted on that issue.

The second portion of the district court's opinion sets forth the reasons for its conclusion that Petitioner's amended complaint failed to state a cause of action under 42 U.S.C. §1983. Although the district court discussed the issue of freedom of association under the First Amendment to the United States Constitution in some detail, the Court also found that the amended complaint did not allege a violation of Petitioner's right to equal protection of law. Again,

without opinion, the Third Circuit affirmed the district court's dismissal of the amended complaint. Because the petition before this Honorable Court raises only the issue of equal protection, the decisions of the courts below relating to freedom of association will not be discussed.

The second step in determining whether a conflict between federal courts of appeals exists is to analyze the pertinent decisional law. Petitioner cites several cases which purport to advance his contention that his amended complaint stated a viable equal protection claim. Scrutiny of these cases, however, shows them to be inapposite.

In Bethel v. Jendoco Construction Corp., 570 F.2d 1168 (3rd Cir. 1978), a black carpenter commenced a civil rights

action against various companies engaged in the construction business and certain unions which represented construction workers. Plaintiff filed an equal protection claim under §§1981, 1983, 1985, 1986 and 2000(e) et seq. of Title VII of the Civil Rights Act of 1964. The court of appeals reversed the trial court's dismissal of plaintiff's claims under §§1981, 1985, 1986 and 2000(e) et seq. of Title VII, but affirmed the dismissal of plaintiff's §1983 claim. Unlike the case at bar, Bethel arose in the employment context and involved discrimination claims such as not being hired for jobs when whites were hired, being laid off before whites, being called back to work after whites, being assigned to undesirable duties, and being passed over for overtime work and for promotions. In the instant

case, Petitioner makes no allegations remotely similar to those in Bethel. In addition, the legal theories in Bethel are entirely different than those in the present case. Petitioner's case involves a §1983 claim whereas in Bethel the court of appeals dismissed the §1983 claims because the defendant's actions did not arise "under color of state law". The holding in Bethel, therefore, provides no support for Petitioner's assertion that he has a viable cause of action under §1983.

Petitioner also cites this Honorable Court's decision in Gomez v. Toledo, 446 U.S. 635, 64 L.Ed.2d 572, 100 S. Ct. 1920 (1980), although his basis for doing so is unclear. The holding in Gomez was that in order to plead a viable course of action against a public official under §1983, a plaintiff was not required to allege bad

faith on the part of the public official. No such issue exists in the present case. Thus, the decision in Gomez is entirely inapposite.

Apart from Bethel, the only other appellate decision cited by Petitioner is Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262 (10th Cir. 1989), incorrectly cited in the petition as a case from the Third Circuit. The Tenth Circuit's decision in Phelps provides little support for Petitioner's position. In that case, plaintiff, a white attorney, brought suit against a newspaper, its employees and the former Attorney General of the State of Kansas alleging that the defendants conspired to publish defamatory articles about him in violation of federal civil rights statutes, the First and Fourteenth Amendments, and the Racketeer Influenced

and Corrupt Organizations Act (RICO). The newspaper had published two articles about plaintiff. The first article summarized and quoted an investigative report about plaintiff prepared by the Kansas attorney general's office. The report discussed how plaintiff had brought numerous lawsuits soon after alleged incidents and settled them for a fraction of the amount sought. Critics of plaintiff were quoted in the article as stating that he brought "strike suits" for "nuisance value". The second article discussed plaintiff's background and education, his representation of the poor and minorities in Kansas, and his disbarment from Kansas courts in 1979. This article stated that many people saw him as a crusader for the rights of the poor and minorities. The article observed that plaintiff "sees

himself as the ideological heir of a long line of Baptist preacher-lawyers who used the Bible as a source of inspiration".

Although the Tenth Circuit reversed the district court's dismissal of plaintiff's §1983 claim based on equal protection, some of the statements in one of the articles provided a reasonable basis for inferring a race-based animus. In particular, plaintiff was described as a "black man's lawyer", a "modern-day John Brown" and a "savior to blacks in Kansas". These statements, coupled with the general allegations of race-based animus, convinced the Tenth Circuit that plaintiff had stated a claim under the equal protection clause of the Fourteenth Amendment sufficient to overcome a motion to dismiss.

In sharp contrast to the situation in Phelps, Petitioner cannot point to any action or statement from which a race-based animus can be inferred. In the instant case, Petitioner's entire equal protection argument rests on the fact that he is black and that a white police officer expressed his opinion about Petitioner's activities. Other than Petitioner's unsupported assertion that racial animus prompted Officer Schreibeck's remark, the amended complaint contained no objective factual allegations from which racial animus can be inferred.

Petitioner in his amended complaint has alleged nothing more than a cause of action for defamation under state law. As such, his claim is not within the ambit of civil rights protected under the United States Constitution, and so the lower

courts in this matter correctly held. Ellingburg v. A. G. Lucas, 518 F.2d 1196 (8th Cir. 1975); Collins v. Cundy, 603 F.2d 825 (10th Cir. 1979); Johnson v. Hackett, 284 F. Supp. 933 (E.D. Pa. 1968). Section 1983 should not be used to "federalize" what is clearly a state tort law claim.

Petitioner has not demonstrated that the Third Circuit's decision to affirm the district court's dismissal of his amended complaint is in conflict with a decision of another federal court of appeals on the same matter. The Bethel and Phelps decisions, supra, are easily distinguished. Accordingly, because no conflict between the federal circuit courts exists, this Honorable Court should not exercise its discretionary review.

CONCLUSION

For the reasons set forth above, this Honorable Court should deny Petitioner Henry Holley's petition for writ of certiorari.

Respectfully submitted,

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On the Brief

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HENRY HOLLEY, Plaintiff,	:	CIVIL ACTION
	:	No. 90-8012
vs.	:	
RONALD SCHREIBECK, and CITY OF ALLENTOWN, Defendants	:	JURY TRIAL DEMANDED

ORDER

AND NOW, this 25th day of January, 1991, upon consideration of Defendants' motion to dismiss, IT IS ORDERED that Defendants' motion to dismiss is hereby GRANTED and that Plaintiff's amended comp aint is dismissed without leave to ame d. 1

BY THE COURT:

Franklin S. VanAntwerpen, J.

1. NO TIMELY RESPONSE HAS BEEN FILED AND

THE COURT DEEMS THIS MOTION TO BE UNOPPOSED AND UNCONTESTED UNDER LOCAL R.CIV.P. 20(c). NO BRIEF HAS BEEN FILED AS EXPRESSLY REQUIRED. IN ADDITION THE AMENDED COMPLAINT DOES NOT MAKE OUT A FEDERAL CAUSE OF ACTION.

FILED JAN 28 1991